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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

Petitioners,

—v.—

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' ("plaintiffs' ") opposition underscores why certiorari should be granted.

I.

Ingersoll-Rand Neither Dealt with ERISA Standing Nor Modified *Firestone*—and the Court Needs to Clarify this Point.

Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990), does not even mention the word "standing" or ERISA's definition of "participant," does not discuss standing under ERISA § 510, does not mention the Court's unanimous holding in *Firestone Tire & Rubber*

Co. v. Bruch, 489 U.S. 101 (1989)—the Court's seminal decision construing the defined term "participant"—and, in short, has nothing to do with ERISA standing. *See* Mobil Pet. at 14-16.[1]

That plaintiffs (and the Fifth Circuit) suggest otherwise confirms why the Court should grant certiorari to put to rest the confusion and uncertainty *Firestone* was supposed to end.

II.

ERISA Standing Should Be Decided Now to Carry Out Congressional Intent and Prevent Waste of Scarce Judicial Resources.

Mobil's petition raises a purely legal issue of statutory construction. The Fifth Circuit's decision needs, and is ripe for, immediate review.

The issue is not whether plaintiffs can prove sometime in the future that they would have standing under the Fifth Circuit's "but-for" analysis, but whether the whole idea of "but-for" standing is wrong as a matter of law—because (among other reasons) it conflicts with ERISA's statutory language, *Firestone* and the decisions of the other Circuits that have addressed the issue. Mobil Pet. at 7-16.

The Court has not hesitated to grant certiorari where a court of appeals has reversed a district court's dismissal of a complaint for lack of standing and remanded for application of a questionable legal theory. *E.g.*, *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185 (1990); *Allen v. Wright*, 468 U.S. 737, 748-49 (1984); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 470-72 (1982); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 469-70 (1982).

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1 "Mobil Pet." refers to Mobil's petition for certiorari.

The Court should do so here. Plaintiffs admit [at 22-24] that the result of the Fifth Circuit's "but-for" analysis is to place the issue of former employees' ERISA standing under the cloud that *Firestone* sought to dispel, and that years of expensive litigation will be required to articulate the doctrine's precise contours. These admissions only confirm the need for prompt review to restore the predictability that ERISA was intended to establish. Mobil Pet. at 18-21; *see also Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992) (an "important policy underlying ERISA [is the] uniform national treatment of pension benefits"); *Sandoval v. Aetna Life & Casualty Ins. Co.*, No. 90-2217, 1992 U.S. App. Lexis 13517, at *17 (10th Cir. June 16, 1992) (Congress sought to reduce "mounting costs of administering a plan" and " 'the number of frivolous lawsuits under ERISA' ").[2]

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2 Contrary to plaintiffs' suggestion [at 23], the Court should not wait for a possible appeal under 28 U.S.C. § 1292(b) in another case litigated by plaintiffs' lawyers, *Raymond v. Mobil Oil Corp.*, No. 88-Z-2112 (D. Colo. June 25, 1992).

First, the uncertainties *Christopher* has created require authoritative guidance from the Court. The number of recent district court cases plaintiffs cite—including *Raymond* itself—illustrates why a dispositive decision from the Court is so important.

Second, even if the Tenth Circuit permits a § 1292(b) appeal (which plaintiffs' lawyers have opposed), it may affirm or reverse on grounds other than those set forth by the district court or in the certified question (which does not cite *Christopher*). *In re Cinematronics, Inc.*, 916 F.2d 1444, 1448 (9th Cir. 1990); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987). There is therefore no guarantee that *Raymond* will provide the Court with an opportunity to address this threshold issue.

Third, Mobil (as well as other litigants in the Fifth and other Circuits) should not be subjected to the uncertainties wrought by *Christopher*—and the expense of further litigation—regardless of what (if anything) the Tenth Circuit may do in *Raymond*. *See Sandoval*, *supra*; *see also* Mobil Pet. at 21.

III.

The Decision Below Conflicts with *Firestone* (and Decisions of Other Circuits).

A. The Holding that the Defined Term "Participant" Means Different Things in the Same Statute Conflicts With *Firestone*.

In *Firestone*, the Court construed ERISA § 3(7)'s definition of "participant," 29 U.S.C. § 1002(7).

It held that former employees are not "participants" entitled to sue under ERISA § 502(a), 29 U.S.C. § 1132(a), unless they " 'have a reasonable expectation of returning to covered employment' or . . . a 'colorable claim' to vested benefits." 489 U.S. at 117 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)).

Plaintiffs here have neither. Before they filed suit (four years after they retired), they never asked (or suggested) that Mobil rehire them. And they received all their vested benefits when they retired more than seven years ago.

The Fifth Circuit, however, opined that *Firestone*'s construction of the defined term "participant" was *not* "applicable in all cases." [22a.[3]]

The court said that, in "cases involving *allegations* of discharge," former employees could bring an ERISA suit—without having *either* "a colorable claim to vested benefits" *or* "a reasonable expectation of returning to covered employment" [22a-23a (emphasis added)]—as long as they "claimed" that "but for" their allegedly wrongful discharge they would have been "participants."

This Court has repeatedly emphasized that "a word is presumed to have the same meaning in all subsections of

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3 Appendix citations are to the appendix to Mobil's certiorari petition.

the same statute," *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983); *accord Patterson v. Shumate*, 112 S. Ct. at 2246-47 & n.2; *id.* at 2251 (Scalia, J., concurring)—particularly where it is a statutorily defined term.

On this ground alone, certiorari is necessary. If the Fifth Circuit is correct that the same statutorily defined word can mean two (or more) very different things in different parts of the same statute—and that *Firestone*'s holding is *not* "applicable in all cases" [22a] (or, in plaintiffs' words [at 15], "differs depending upon the nature of the ERISA claim asserted")—ERISA litigants and the lower courts need to have this Court authoritatively say so.

B. "But For" Standing also Conflicts with *Firestone* (and with Decisions of Other Courts of Appeals).

Plaintiffs do not meet either part of *Firestone*'s two-pronged definition of "participant."

The Fifth Circuit correctly held that, "where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for *damages*, not vested *benefits*." [21a (emphasis added).] The court therefore recognized that plaintiffs did not meet *Firestone*'s first prong because they did not have a colorable claim to *benefits*. [*Id.*] *See* Mobil Pet. at 16-17.

But the Fifth Circuit allowed plaintiffs to continue their ERISA suit even though they could not satisfy *Firestone*'s second prong: that they have a "reasonable expectation of returning to covered employment."

Instead, the court articulated a contrary (and conflicting) test: when a former employee alleges a wrongful discharge, his or her standing to sue under ERISA depends on whether "*but for* the employer's conduct

alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits." [23a (second emphasis in original).]

Firestone, however, pointed out that the notion of "but-for" standing "begs the question of who *is* a 'participant' and renders the definition set forth in [ERISA § 3(7)] superfluous." 489 U.S. at 117 (emphasis added).[4]

In the short time since Mobil filed its certiorari petition, the Eleventh Circuit has also held—in conflict with the Fifth Circuit—that a former employee who claims he would not have retired "but for" a misrepresentation about changes in available pension benefits cannot sue as a "participant" under ERISA. *Sanson v. General Motors Corp.*, No. 91-8528, 1992 U.S. App. Lexis 15830, at *1-2, *9-14 (11th Cir. July 15, 1992); *cf. Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 893 (10th Cir. 1991) (claim that plaintiff "should have been" a "participant" "falls without the jurisdictional grant of ERISA").

We respectfully submit that the Eleventh and other Circuits are correct; the Fifth Circuit is wrong; and now is the time for this Court to resolve a fundamental issue that, as a result of the Fifth Circuit's deci-

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4 Plaintiffs cannot reconcile *Christopher*'s "but for" analysis with the decisions of other courts by arguing [at 21] that the Fifth Circuit's approach depends on a former employee's ability to show that he or she *was* a plan "participant" at the time of the alleged ERISA violation. The Fifth Circuit's construction rests on the broader, counterfactual claim that, but for the alleged violation, the former employee "*would* be" a current employee with standing to sue. [23a (emphasis in original.)]

The former employees in *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986), and *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983), also claimed they *would have been* participants in benefit plans if they had not been fraudulently induced not to be—and therefore could also have brought ERISA suits under the Fifth Circuit's "but for" standing analysis.

sion, is creating turmoil in the lower courts—and in the ability of companies across the country to comply with ERISA's comprehensive statutory framework. *See* Mobil Pet. at 18-21.

IV.

ERISA Standing Cannot Be Judicially Created: ERISA Protects Benefits, Not Employment.

Plaintiffs would have this Court hold that ERISA § 510 overrides employment agreements or state-law employment-at-will doctrines and "reaches . . . conduct that harms the employment relationship," independent of any "deprivation of benefits." [Pl. Br. at 16; *accord id.* at 24.]

This theory fundamentally misconstrues the purpose of both ERISA and § 510.

Section 510—like ERISA's other provisions—protects *benefits*, not jobs. *Firestone*, 489 U.S. at 113 ("ERISA was enacted . . . 'to protect contractually defined benefits' "); Mobil Pet. at 16-21.

ERISA does this by "ensuring that 'if a worker has been promised a defined pension benefit upon retirement—*and if he has fulfilled whatever conditions are required to obtain a vested benefit*—he actually will receive it.' " *Patterson v. Shumate*, 112 S. Ct. at 2250 (emphasis added) (citation omitted).

ERISA § 510 therefore provides a private remedy to the extent—but only to the extent—that an employer's conduct is aimed at preventing an employee from receiving his or her accrued *benefits*.[5]

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5 *E.g.*, *Humphreys v. Bellaire Corp.*, No. 91-3584, 1992 U.S. App. Lexis 12543, at *16-18 (6th Cir. June 4, 1992); *Simmons v. Willcox*, 911 F.2d 1077, 1082 (5th Cir. 1990); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347-48 (3d Cir. 1990);

The purpose of § 510 is to prevent an employer from "circumvent[ing] the provision of promised benefits" by firing an employee before he or she can fulfill eligibility requirements for receiving retirement benefits for past years of service. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 485; *see, e.g.*, 2 Legislative History of the Employee Retirement Income Security Act of 1974, 1774 (1976) ("no vesting formula will produce real employee protection so long as employers are free to fire employees to defeat pension eligibility"); *accord id.* at 1758, 1811, 1836; *see also West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (describing § 510's legislative history).

ERISA § 510 is not—and was never intended to be—an omnibus federal wrongful-discharge statute for any employee who happens to be covered by an employee-benefit plan.

Consistent with ERISA's basic purpose of protecting *benefits*, § 510 itself provides that "[t]he provisions of section [502] shall be applicable in the enforcement of this section" (a sentence that plaintiffs omit in their brief [at 10]). Section 502(a), in turn, allows only "participant[s]" (and their beneficiaries) to sue—and a "participant" is defined as an employee or former employee "who is or may become eligible to receive a *benefit*," ERISA § 3(7) (emphasis added).[6]

Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988); *Lojek v. Thomas*, 716 F.2d 675, 680-81 (9th Cir. 1983).

The cases plaintiffs cite [at 16, 24] hold that harm to the employment relationship is a *necessary* element of a § 510 claim—but neither those cases nor any others support the argument that it is a *sufficient* element. *See, e.g., Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 893 (3d Cir. 1986) ("employee in a Section 510 suit needs to establish that at the time of the alleged violation, he or she had the potential of receiving benefits").

6 The cases plaintiffs say [at 12, 22-23] "articulate the principles of standing applied below" all involved persons who—

The Court has repeatedly admonished that the lower courts should not create "equitable" exceptions to ERISA's express statutory framework. *Patterson*, 112 S. Ct. at 2250; *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 376 (1990). " 'If exceptions to this policy [of protecting benefits] are to be made, it is for Congress to undertake that task.' " *Patterson*, 112 S. Ct. at 2250 (quoting *Guidry*, 493 U.S. at 376).

By judicially expanding ERISA to allow damage suits by former employees who have received all their accrued benefits, the Fifth Circuit has substituted its judgment for that of Congress—and threatened the benefits available to actual "participants" by subjecting pension plans to potentially ruinous suits by persons whom Congress never authorized to sue.

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unlike plaintiffs here—had *not* yet received all their accrued benefits or had been deprived of the opportunity to fulfill "eligibility requirements . . . in the future," *Firestone*, 489 U.S. at 117-18—and not merely the ability to accrue more benefits under a plan whose eligibility requirements they had already met. *See* Mobil Pet. at 15 & n.7.

Plaintiffs also misrepresent [at 22-23] that the Third Circuit in *Saporito v. Combustion Eng'g, Inc.*, No. 87-5144 (3d Cir. June 29, 1989), "reaffirmed an even broader principle." The quoted portion of the slip opinion simply quoted the court's earlier decision—which this Court vacated—to explain the case's procedural history. *Id.*, slip op. at 3-4 n.1. Following this Court's remand, the Third Circuit in turn remanded to the district court, and did not rule on the standing issue. *Id.* at 5.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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